No. 96-827

In the Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL, PETITIONER

v.

PATRICIA BRITTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, in response to a defendant public official's assertion of qualified immunity, a plaintiff must prove by clear and convincing evidence the intent element of a constitutional tort claim of retaliation for the exercise of First Amendment rights.

2. Whether a public official asserting qualified immunity is entitled to summary judgment before discovery if the official alleges a legitimate justification that would have been a reasonable basis for the challenged action, without regard to whether it was the actual motive.

3. Whether other protections are appropriate to serve the purposes of qualified immunity by shielding defendant public officials from the burdens of litigation regarding their intent.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Petitioner was convicted of murder and is serving a life sentence in the District of Columbia's correctional system. Pet. App. 3a. In 1989 petitioner sued under 42 U.S.C. 1983, seeking money damages from respondent, a District of Columbia correctional official, in her personal capacity. He alleged that respondent violated his due process rights and his right of access to the courts by causing several boxes containing personal items, including legal papers, to be misdelivered. See generally Pet. App. 3a, 146a-147a, 154a-160a. On remand to the district court following an interlocutory appeal, petitioner amended his complaint to

add a First Amendment claim that respondent caused the misdelivery of petitioner's boxes in retaliation for petitioner's statements to the press, his filing of grievances and lawsuits, and his assistance of other prisoners in filing grievances. See generally *id.* at 4a, 28a-34a, 126a, 175a-191a. Only the First Amendment claim is at issue here.[1]

1. In 1990, the district court denied motions to dismiss petitioner's due process and court-access claims, Pet. App. 161a-169a, but on respondent's interlocutory appeal under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), the court of appeals held that the complaint did not satisfy applicable pleading requirements, Pet. App. 145a-162a. The court remanded to permit repleading. *Id.* at 160a; see *id.* at 119a-120a. Noting that in his appellate brief petitioner had also articulated a First Amendment claim, the court of appeals noted that "[p]ermission to file additional amendments to the complaint, such as to raise plaintiff's new First Amendment theory, lies in the sound discretion of the district court." *Id.* at 147a, 160a.

2. On remand, petitioner filed a Fourth Amended Complaint that included the First Amendment claim at issue here. Petitioner alleged that respondent "withheld and diverted" his property "out of hostility toward [petitioner] stemming from his authorized communications with newspaper reporters, informal requests for redress of grievances, assistance to and authorized association with other prisoners seeking redress, persistent requests for return of his property, or past, pending, or contemplated litigation against her, other Department of Corrections employees, or the District of Columbia." Pet. App. 189a (Complaint ¶ 41); see *id.* at 175a-181a (Complaint ¶¶ 6-18). He and several other prisoners had been transferred from a

[1] Petitioner also raised common-law claims and Section 1983 claims against the District of Columbia. See Pet. App. 97a-99a.

District of Columbia prison to a facility in Spokane, Washington, in 1988. *Id.* at 179a-180a (Complaint ¶¶ 15-16). Petitioner alleged that, upon his re-transfer to facilities on the East Coast in 1989, respondent retaliated against him by having his boxes of personal effects—which he claims she knew contained legal materials relating to ongoing cases—delivered to his brother-in-law outside the prison system, thereby delaying petitioner's receipt of the materials. *Id.* at 181a-182a, 183a-189a (Complaint ¶¶ 19-20, 24-40). Petitioner alleged that, as a result of the delay, he incurred "the expense of first class mail delivery of his three heavy boxes" and "the expense of purchasing underwear, tennis shoes, soft shoes, and other items," and that he suffered mental distress. *Id.* at 190a-191a (Complaint ¶ 45).

3. On February 15, 1994, the district court granted respondent's motion to dismiss the Fourth Amended Complaint. Pet. App. 115a-143a. The court held that the First Amendment claim failed to meet the District of Columbia Circuit's requirement that a plaintiff plead "specific *direct* evidence of intent." *Id.* at 128a (quoting *Kimberlin* v. *Quinlan*, 6 F.3d 789, 793 (D.C. Cir. 1993), vacated on other grounds, 115 S. Ct. 2552 (1995)). The court concluded that his allegations "are entirely circumstantial," *id.* at 129a, "[a]t best" showing that respondent "was hostile towards him generally and callous in her regard for constitutional rights," *id.* at 130a-131a.[2]

4. A panel of the court of appeals affirmed the dismissal of some of petitioner's claims, Pet. App. 100a-106a,

[2] The court also dismissed petitioner's claims of denial of procedural and substantive due process, right of court access, and right to petition for redress of grievances, and dismissed his state-law claim of conversion for lack of pendent jurisdiction. Pet. App. 113a-114a, 120a-125a, 131a-141a.

but the en banc court decided *sua sponte* to review the First Amendment retaliation claim and to reexamine its requirements for presenting motive-based constitutional claims against public officials, *id.* at 107a-109a. The en banc court ordered further briefing on five questions, including whether the court should retain its "direct evidence" rule (requiring direct as opposed to circumstantial evidence of unconstitutional motive to overcome an official's qualified immunity defense), and, if not, whether there are any "alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation." *Id.* at 109a.

In the en banc proceedings, the United States filed an amicus brief and presented oral argument. The United States asked the Court to reject the direct evidence standard. See Brief for the United States as Amicus Curiae Upon *In Banc* Consideration, *Crawford-El* v. *Britton* (D.C. Cir.) (No. 94-7203) (U.S. En Banc Br.). In its stead, the United States' brief proposed that, in motive-based constitutional tort cases where the defendant asserts a qualified immunity defense, the court should, at the motion-to-dismiss stage, require allegations raising a "strong inference" of improper motive. *Id.* at 27-32.

The United States further argued below that, at the summary judgment stage, "the plaintiff should be required to offer evidence that, at a minimum, creates a genuine dispute about facts that raise a strong inference of improper motive." U.S. En Banc Br. 35. The United States noted that, although "there is no firm bar against discovery before a court rules upon a motion for summary judgment," motive-based constitutional claims against defendant officials call for "strict application" of Federal Rule of Civil Procedure 56(f). *Id.* at 36. In particular, the United States contended that "the plaintiff must be required to explain in detail what discovery is necessary and why, and the court should only permit discovery where it is clearly warranted." *Id.* at 38. Because the case had been resolved on the pleadings in the district court and had not reached the summary judgment stage, the United States argued that the en banc court should not decide whether it would be appropriate to require that a plaintiff meet additional procedural requirements or a higher standard of proof to defeat summary judgment or to prevail at trial. *Id.* at 35.

5. On August 27, 1996, the court of appeals issued its en banc decision. Pet. App. 1a-99a. Judge Williams filed an opinion joined by Judges Sentelle, Buckley, and Henderson (*id.* at 2a-34a), with concurring opinions by Judges Silberman (*id.* at 35a-57a) and Henderson (*id.* at 72a-77a), and an opinion by Judge Ginsburg concurring in part (*id.* at 58a-71a). Chief Judge Edwards, joined by Judges Wald, Randolph, Rogers, and Tatel, filed an opinion concurring in the judgment to remand. *Id.* at 78a-95a.

a. A clear majority of the court rejected the direct evidence rule, Pet. App. 9a-12a, 58a, 72a, 78a, with only Judge Silberman stating that he would have adhered to that rule, *id.* at 43a-44a.

b. Judge Williams, in an opinion in which a majority of the court concurred in part, called for new rules to protect public officials from the burdens of litigating claims that they acted with an unconstitutional motive.[3] He noted that the court's "inquiry is framed by the competing goals described by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S 800, 816-818 (1982)—vindicating constitutional rights but at the same time protecting officials from

[3] Judge Williams concluded that petitioner had alleged a violation of a clearly established First Amendment right, Pet. App. 26a-27a, and that his injury was not de minimis, *id.* at 27a-28a.

exposure to discovery and trial that would unduly chill their readiness to exercise discretion in the public interest." Pet. App. 2a-3a. In view of the court's rejection of the direct evidence rule, Judge Williams identified two new rules that he characterized as "adequate alternative means of reconciling *Harlow*'s twin purposes in the context of constitutional torts dependent on the official's having an improper motive" (*id.* at 11a): First, an official should be entitled to "summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue," and, second, "unless the plaintiff offers clear-and-convincing evidence of the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Id.* at 3a.[4] A majority of the court concurred in the adoption of the clear-and-convincing-evidence standard, but not in the *per se* discovery bar.[5]

Judge Williams drew on the policies supporting qualified immunity to justify adoption of the clear-and-convincing-evidence standard for the motive element of constitutional tort claims. Pet. App. 16a-24a. Although "[c]onventional summary judgment principles supply some protection to defendants," he reasoned that, "[e]ven cut off from the

[4] In light of the bar on discovery regarding motivation and the higher standard of proof, Judge Williams' opinion eschewed application of a requirement of "heightened pleading" of unlawful motive. Pet. App. 12a, 22a; see also *id.* at 78a (opinion of Edwards, J.).

[5] See Pet. App. 13a-24a (opinion of Williams, J., joined by Sentelle, Buckley, and Henderson, JJ.); *id.* at 58a (concurring opinion of Ginsburg, J.) (agreeing with imposition of clear and convincing evidence standard, but not with discovery bar); *id.* at 44a-46a (concurring opinion of Silberman, J.) (favoring standard more demanding of plaintiffs).

fruit of depositions and other discovery against the defendant and her colleagues, plaintiff will often be able to depict a selective pattern of decisions that, without evidence of a more complete set of comparable ones, and extensive explanation by one or more decision-makers, will look fishy enough that a jury could reasonably find illicit motive by a preponderance." *Id.* at 16a-18a. Because "*Harlow* plainly view[ed] the costs of error in the grant or denial of relief in such cases as asymmetrical," Judge Williams reasoned that it is appropriate to value the "social costs of (1) litigating and (2) erroneously affording recovery" in some cases as greater than "the social costs of erroneously denying recovery" in others. *Id.* at 18a.

Judge Williams concluded that a bar against discovery into illicit motive is also warranted, because "[t]he primary burdens of litigation occur in discovery and trial." Pet. App. 13a. In view of the wide range of facts that may be relevant to motive, "[i]f the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive." *Ibid.*[6]

After setting forth the foregoing standards, Judge Williams noted that in this case the district court had dismissed petitioner's Fourth Amended Complaint, and that petitioner therefore had not yet moved for summary judgment. Pet. App. 25a. In view of the procedural history of the case to date, however, Judge Williams elected to

[6] Although Judge Williams would require a plaintiff, without the benefit of discovery, to provide "assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive," Pet. App. 13a, he would allow discovery on other issues, if warranted, including "discovery concerning a defendant official's state of mind for other purposes," *id.* at 15a.

consider whether affidavits embodying the assertions in petitioner's Fourth Amended Complaint could successfully withstand a motion by respondent for summary judgment on qualified immunity grounds. *Id.* at 25a-26a. He concluded that they could not, explaining that a jury could not find that petitioner's assertions constitute clear and convincing evidence of unconstitutional intent. *Id.* at 28a-34a. At the same time, Judge Williams made clear that, on remand, petitioner may attempt to bolster his evidence—perhaps in part through discovery, if he is able to conduct discovery in accordance with the standards set forth in Judge Ginsburg's separate opinion (discussed at pages 8-9, *infra*). Pet. App. 34a.

c. In his concurring opinion, Judge Silberman favored extending to all motive-based constitutional claims against government officials the more stringent test of *Halperin* v. *Kissinger*, 807 F.2d 180, 184-185 (D.C. Cir. 1986), which the court of appeals had developed for national security cases. Pet. App. 46a-57a. In Judge Silberman's view, "if the challenged defendants' actions, without regard to their actual intent, are consistent with an objectively reasonable intent, the defendants are entitled to immunity. And even if the defendants are not able to meet this burden, they are still entitled to immunity if they are able to prove that their actual motivation was legitimate." *Id.* at 50a.

d. Judge Ginsburg filed an opinion concurring in the adoption of a clear-and-convincing-evidence standard of proof of unconstitutional motive, Pet. App. 58a, but disagreeing with Judge Williams' *per se* bar against discovery into a defendant's motive, *id.* at 58a-64a. Judge Ginsburg explained that a complete bar on discovery before a district court rules on a motion for summary judgment would unjustifiably "require the plaintiff to obtain evidence without the ability to compel its production from those most likely to have it." *Id.* at 59a. Judge Ginsburg would, however, adopt a special discovery threshold, requiring a district court to grant a pre-discovery summary judgment motion asserting lack of unconstitutional motive "unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." *Id.* at 63a.

Judge Williams' opinion acknowledged that Judge Ginsburg's opinion was controlling on the discovery issue, as "the opinion consistent with the disposition on the narrowest grounds, i.e., a 'common denominator' of the reasoning of the majority." Pet. App. 34a (quoting *King* v. *Palmer*, 950 F.2d 771, 780-781 (D.C. Cir. 1991), cert. denied, 505 U.S. 1229 (1992)); but see *id.* at 79a (opinion of Edwards, J., concurring in the judgment to remand).[7]

e. Judge Henderson also wrote a concurring opinion, in which she "fully endorsed" the adoption of a clear-and-convincing-evidence standard, Pet. App. 72a,[8] but expressed her view that petitioner's claims are frivolous and should have been dismissed at the outset of the litigation under 28 U.S.C. 1915(d). Pet. App. 76a-77a.

f. Chief Judge Edwards (joined by Judges Wald, Randolph, Rogers, and Tatel) filed an opinion concurring in the judgment to remand the case. Pet. App. 78a. Chief Judge Edwards agreed with the court's abandonment of the heightened pleading and direct evidence rules, but

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[7] Like Judge Williams, Judge Ginsburg concluded that the facts that petitioner had alleged to date would not satisfy the clear-and-convincing-evidence standard. Pet. App. 71a.

[8] Judge Henderson did not comment on Judge Williams' proposed discovery bar or on Judge Ginsburg's heightened discovery threshold.

disagreed with the majority that alternative mechanisms should be adopted to protect public officials from the burdens of litigating the factual question whether they acted with unconstitutional motivation. *Id.* at 78a-79a. In his view, "[u]nder the principles enunciated in *Hobson* [v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)], plaintiffs can survive an initial motion for summary judgment, prior to discovery, by providing 'non-conclusory allegations of evidence' of the defendant's unconstitutional intent." *Id.* at 84a. If the plaintiff cannot specifically identify such evidence before discovery, "the trial judge may invoke Rule 56(f) and deny the summary judgment motion" based on the plaintiff's showing of "a reasonable likelihood that additional discovery will uncover evidence to buttress the claim." *Ibid.*

g. The en banc court vacated the dismissal of the First Amendment claim (and the pendent state claim) and ordered that the case be remanded following the panel's resolution of issues remaining between petitioner and the District of Columbia government. Pet. App. 34a, 64a, 71a, 78a.

6. The panel thereafter ruled on petitioner's claims against the District of Columbia government, and entered judgment remanding the case to the district court for further proceedings. Pet. App. 96a.[9]

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[9] Although the panel stated that "the *en banc* court has now disposed of the First Amendment retaliation claim," and referred to "the fact that Crawford-El's claims against Britton herself do not survive the heightened evidentiary burden imposed by the *en banc* court," Pet. App. 97a-98a, those comments must be understood to refer to the en banc court's conclusion that the First Amendment claim *as it now stands* would not survive, *id.* at 34a, 64a, 71a. In view of the en banc court's holding, *ibid.*, the panel's judgment that "the case is remanded" necessarily encompasses a remand of the First Amendment claim. *Id.* at 96a.

DISCUSSION

The United States agrees with the court of appeals that special protections are required to effectuate the purposes of qualified immunity where constitutional claims against public officials in their individual capacities turn upon whether the officials acted with unconstitutional motives. The protections of qualified immunity as developed in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and related cases would be rendered ineffective if a plaintiff could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991). Questions regarding precisely which protections strike an appropriate and workable balance between the need to protect public officials against unduly burdensome litigation, and the preservation of adequate remedies for and deterrence of unconstitutional conduct, see *Harlow*, 457 U.S. at 807, are important and recurring ones.

Certiorari should be denied here, however, because review would be premature and because, although he objects to the standards the court adopted, petitioner was the prevailing party in the court of appeals. The court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings on petitioner's First Amendment claim. The case has not even progressed to the summary judgment stage. This Court should decline to review the court of appeals' interlocutory decision in the abstract, before petitioner has had an opportunity to attempt to meet the new standards and the lower courts have definitively resolved

the validity of petitioner's First Amendment claim under those standards.

Moreover, although the specific approach taken by the court below differs from that of other circuits, most courts of appeals have agreed on the need for additional protections for public officials faced with motive-based constitutional claims. Evaluation of the available protections depends in part on how particular requirements operate in practice. Denying review here would give the District of Columbia Circuit a chance to implement its new standards, and the other courts of appeals the opportunity to consider them, before this Court takes up the issue.

1. The court of appeals in this case correctly concluded that established policies underlying the qualified immunity defense require special protections for public officials against the burdens of litigation based solely on assertions that their otherwise legitimate actions are unconstitutional because allegedly taken with unlawful intent. While this Court has held that 42 U.S.C. 1983 and the principles recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), authorize suits for damages against public officials in their individual capacities, the Court at the same time has been aware of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974); see *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992); *Harlow*, 457 U.S. at 807 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978)). This Court has developed the qualified immunity defense based upon a recognition of the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter his willingness to execute his

office with the decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 240.

Qualified immunity is intended to protect public officials not only from liability, but also from the burdens of litigation. *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991); *Wyatt*, 504 U.S. at 165-169; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). This Court has repeatedly recognized that, in order to realize the protection of immunity from suit, the entitlement to qualified immunity must be determined at the earliest stages of the litigation. See *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987); *Siegert*, 500 U.S. at 232. Indeed, where possible, until the "threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818; see *Creighton*, 483 U.S. at 647 n.6 (although in limited cases "discovery may be necessary," it must be "tailored specifically to the question of * * * qualified immunity").

The Court in *Harlow* reformulated qualified immunity in order to make it a more effective protection for public officials against the burdens of litigation and risks of liability on insubstantial claims. Before *Harlow*, public officials were entitled to qualified immunity from suit when they had "reasonable grounds for the belief [in the legality of their action] formed at the time and in light of all the circumstances, *coupled with good-faith belief*." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (emphasis added) (quoting *Scheuer*, 416 U.S. at 247-248). The Court in *Harlow* observed, however, that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* [v. *Economou*, 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial," because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 815-816. As long as the official's

state of mind was an element of the immunity defense, the determination of whether the immunity was available required "[j]udicial inquiry into subjective motivation," *id.* at 817, often increasing rather than reducing a defendant's discovery and trial burdens. *Harlow* accordingly held that the availability of qualified immunity should turn not on the official's subjective "good faith," but on the objective, legal question whether the right asserted by the plaintiff was clearly established at the time of the action in question. *Id.* at 818.

Proof of state of mind is also, however, an element of many constitutional claims, including claims of unconstitutional discrimination, see *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (requirement of proof of discriminatory purpose), cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976) (deliberate indifference), and, as in this case, adverse action allegedly based on the content of protected speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). Thus, although a state-of-mind inquiry is no longer part of the qualified immunity *defense* under *Harlow*, the objectively based immunity defense cannot prevent plaintiffs from pleading unconstitutional motive as an element of their own *claims*. See *Siegert*, 895 F.2d at 801 (citing *Hobson* v. *Wilson*, 737 F.2d 1, 29-30 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)). Because the law barring unconstitutionally motivated actions by government officials is likely to be clearly established,[10] virtually any otherwise legitimate adverse action by a public official can be alleged to violate clearly established law if it is further alleged that the action was taken for unconstitutional reasons. If an official faces the threat of suit any time his otherwise lawful actions can be

[10] See, *e.g.*, Pet. App. 26a-27a (concluding that petitioner alleged a violation of clearly established law).

misconstrued to have been improperly motivated, there is a danger that "his willingness to execute his office with decisiveness and the judgment required by the public good" will be undermined. *Scheuer*, 416 U.S. at 240. Claims of unconstitutionally motivated conduct therefore threaten the same interests that support the decision in *Harlow*.

We agree with the court of appeals that *Harlow* supports the adoption of additional measures, beyond the clearly-established-law rule, to protect public officials in the context of motive-based claims. This Court's grants of certiorari in two cases presenting issues closely related to those presented here, see *Kimberlin* v. *Quinlan*, 115 S. Ct. 2552 (1995); *Siegert* v. *Gilley*, 500 U.S. 226 (1991), underscore that these are issues of substantial importance. See Sup. Ct. R. 10(c).[11] The circuits are generally in accord regarding the need to prevent qualified immunity from being rendered illusory by allegations of unlawful motive.[12] There are, to be sure, a range of mechanisms that the Court may consider, and there are potentially significant variations among the existing standards.

[11] *Siegert* and *Kimberlin* were decided on other grounds, however, and the Court thus did not reach the questions presented in the petitions.

[12] See, *e.g.*, *Sheppard* v. *Beerman*, 94 F.3d 823 (2d Cir. 1996); *Blue* v. *Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995); *Gooden* v. *Howard County*, 954 F.2d 960, 969-970 (4th Cir. 1992) (en banc); *Thompkins* v. *Vickers*, 26 F.3d 603, 607-608 (5th Cir. 1994); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989), cert. denied, 494 U.S. 1079 (1990); *Elliott* v. *Thomas*, 937 F.2d 338, 344-345 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992); *Bagby* v. *Brondhaver*, 98 F.3d 1096, 1098 (8th Cir. 1996); *Branch* v. *Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 648-649 (10th Cir. 1988).

Several circuits have held—and we agree—that facts supporting allegations of motive must be pleaded with heightened specificity.[13] In addition, before the en banc court, we argued that the requirement of heightened specificity applicable to the motive element should be supplemented with the requirement that "the specific facts pleaded establish a strong inference of improper motivation." U.S. En Banc Br. 27. Requiring allegations that are more particularized and more strongly indicative of unconstitutional motive raises the threshold of discovery. See Brief for the United States as Amicus Curiae at 24-25, *Kimberlin* v. *Quinlan*, *supra* (No. 93-2068); U.S. En Banc Br. 36-38. That important function also appears to be served by the requirement in Judge Ginsburg's opinion in this case that a plaintiff make a preliminary evidentiary showing of "a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." Pet. App. 63a. Additional protection should be provided at the summary judgment stage. In the court below, we advocated application of the "strong inference" standard on summary judgment, which would require the plaintiff to adduce evidence creating a strong inference of improper motivation in order to place the issue of motive genuinely in dispute.

The en banc court's clear-and-convincing-evidence requirement seeks to serve the same objectives of protecting public officials from the burdens of litigation and liability based on claims that their conduct was unconstitutionally

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[13] See, *e.g.*, *Schultea* v. *Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *Gooden*, 954 F.2d at 969-970; *Elliott*, 937 F.2d at 344-345; *Losavio*, 847 F.2d at 649; Brief for the United States as Amicus Curiae at 20-29, *Kimberlin* v. *Quinlan*, *supra* (No. 93-2068); Brief for the Respondent at 13-25, *Siegert* v. *Gilley*, *supra* (No. 90-96).

motivated. While we agree with the court of appeals that a more demanding standard is necessary, further development of the issues in the lower courts may help to clarify for this Court which mechanisms would best effectuate the purposes of *Harlow*, consistent with retaining avenues for effective remediation and deterrence of constitutional wrongdoing.

2. The petition for a writ of certiorari should be denied because it is premature. In view of the court of appeals' decision to remand the First Amendment claim at issue here, the decision below is interlocutory. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); see generally Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 4.18, at 195-198 (7th ed. 1993) ("[I]n the absence of some * * * unusual factor, the interlocutory nature of a lower court judgment will result in a denial of certiorari.").

Although we agree with the en banc court that petitioner's prospects of ultimate success on his First Amendment claim are dim, see Pet. App. 34a, 64a, 71a, it remains an open question what evidence he will adduce and whether the district court or the court of appeals will find that it meets the new standards. Respondent has not moved for summary judgment on qualified immunity grounds, and petitioner has not filed a response to any such motion. It thus cannot yet be determined whether any evidence that petitioner might present—whether in opposition to

summary judgment, or as a basis for seeking discovery—would suffice.

There are especially strong reasons to deny interlocutory review here, given that, following the district court's dismissal of his First Amendment claim, petitioner succeeded on appeal in obtaining a reversal and a remand for further proceedings. The petition thus challenges not the judgment of the court of appeals—which favored petitioner—but the court's articulation of the standard to be applied on remand in ruling on a summary judgment motion that has not yet even been filed. This Court, however, "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see also *Texas* v. *Hopwood*, 116 S. Ct. 2581 (1996) (opinion of Ginsburg, J., respecting the denial of certiorari). The Court should "await a final judgment on a [claim] genuinely in controversy before addressing the important question[s] raised in this petition." *Id.* at 2581.

Denying review may have the added benefit of affording the court below an opportunity further to explain how its new standards should be applied in practice. For example, the distinction between the heightened discovery threshold set forth in Judge Ginsburg's separate opinion and the ordinary operation of Federal Rule of Civil Procedure 56(f), see Pet. App. 84a (opinion of Edwards, J.), may be clarified in the context of plaintiffs' concrete efforts to meet the new standard. The types and quantum of evidence of unconstitutional motive needed to meet the clear-and-convincing-evidence standard may also be illustrated in practice. Moreover, although Judge Williams' opinion purported to abandon the court of appeals' former "heightened pleading" rule as unnecessary in view of the discovery bar he outlined, *id.* at 12a, 22a; see also *id.* at 78a (opinion of Edwards, J.), a majority of the en banc court did

not support a *per se* discovery bar. As a result, the status of "heightened pleading" in the District of Columbia Circuit remains uncertain, and further decisions by that court may clarify that important question.

3. Although no other court of appeals has adopted the clear-and-convincing-evidence standard or the heightened discovery threshold the court of appeals announced in this case, that circumstance does not counsel in favor of certiorari here. The en banc court's decision makes significant innovations that promise to advance the debate over the appropriate qualified immunity protections for public officials faced with burdensome litigation concerning questions of intent. There has been little opportunity for other courts of appeals to respond to those innovations. But see *Grant* v. *City of Pittsburgh*, 98 F.3d 116 (3d Cir. 1996).[14] In light of the widespread view among the circuits regarding the need for some measures to alleviate

[14] In *Grant*, which was briefed and argued before the en banc court's decision here, the Third Circuit first held that the district court had failed on other grounds to justify its denial of qualified immunity. 98 F.3d at 121-123. It next held, consistent with the decision below, that *Harlow* does not altogether bar consideration of evidence of subjective intent where impermissible intent is an essential element of the constitutional claim. *Id.* at 123-125. Finally, the court addressed an argument in favor of "some sort of 'heightened' procedural burden" at the summary judgment stage. *Id.* at 125-126. Although the Third Circuit referred to the decision below in passing, *id.* at 125, and declined to adopt a heightened summary judgment standard, *id.* at 126, it did not discuss the extensive treatment of the competing considerations bearing on that issue in the various opinions below. Nor did the Third Circuit address at all whether there should be a heightened threshold for discovery, along the lines set forth in Judge Ginsburg's separate opinion. Because a summary judgment motion has not yet been filed in this case, the divergence between the discussion of the summary judgment issue in the opinions below and in the Third Circuit's decision in *Grant* does not render this case a suitable vehicle for review of the summary judgment issue.

the vexing burdens that intent-based claims impose on public officials, the newness of the court of appeals' particular approach, the interlocutory posture of this case, and the likely benefit of further development of the law in the courts of appeals, review is not warranted at this time.[15]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[15] The direct evidence rule at issue in the *Kimberlin* and *Siegert* petitions created not only an express circuit conflict, but a conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121 (1954). See *Siegert*, 500 U.S. at 235-236 (Kennedy, J., concurring). No such conflict is presented by the petition in this case.